# Plan Sponsors Besieged by 401(k) Fee Lawsuits

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The current flurry of class action lawsuits filed against large employers are also targeting 401(k) plan fiduciaries including individual corporate executives, board directors and investment committee members who may all be personally liable for losses under ERISA.

**Each complaint seeks to recover excessive fees and investment losses from plan sponsors and fiduciaries.**

These lawsuits claim that the fee structures imposed by third-party administrators, record keepers, investment managers, and other 401(k) service providers are complex, excessive, undisclosed, illegal and contain prohibited transactions.

By accepting these fee structures, plan sponsors breach their fiduciary obligations to employee participants under ERISA. These lawsuits are forcing full fee disclosure on service providers. The plan sponsors are accused of numerous fiduciary breaches including a failure to disclose relevant information to plan participants.

**Some of the companies targeted:**

Bechtel Corporation
Boeing Co.
Caterpillar Inc.
Deere & Co.
Exelon Corp.
General Dynamics Corp.
International Paper Co.
Kraft Foods Inc.
Lockheed Martin Corp.
Northrop Grumman Corp.
United Technologies Corp.
ABB, Inc.
Fidelity Investments
Principal Life Insurance

### Plan Sponsors Sue Providers

In turn, several plan sponsors have brought lawsuits against their service providers, claiming that the receipt of revenue sharing payments constitutes prohibited transactions. The suits argue that the participants were not only being charged fees unknowingly but that fund assets were being misused and misallocated in ways that were not in the best interest of plan participants.

Schlichter, Bogard & Denton has launched the suits with other suits from Keller Rohrback, the firm responsible for most of the high profile “stockdrop” suits, and Simmons Cooper.

Additional complaints address the funds’ share class used, level of expense ratios for actively-managed fees, lack of low cost indexed funds and exorbitant fees charged for employer stock in the plans.

**Individual corporate executives, board directors and investment committee members may all be personally liable for losses under ERISA**

### ERISA Section 404(c) Protection Is Challenged

Section 404(c) protects fiduciaries from liability for losses that participants may incur in their investment option choices only if participants are given sufficient information with which to make informed investment decisions.

All of the lawsuits challenge Section 404(c) protection by alleging that plan sponsors neglected to adequately inform participants of the expenses netted against their accounts. They go on to claim that by failing to negotiate reasonable compensation for services rendered, the fiduciaries did not comply with Section 404(c), and would remain responsible for any investment losses the participants may have suffered.


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## Exclusive Benefit

The lawsuits also challenge the fees and payments as a violation of the requirement that plan assets be used solely for the benefit of participants and beneficiaries. The lawsuits allege that the revenue sharing payments shifted between mutual fund companies and record keepers were plan assets that were improperly shifted to benefit parties other than plan participants.

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## Regulatory Requirements

These lawsuits follow other regulatory concerns that have focused on 401(k) plan fees. The Department of Labor will propose changes to the regulations that govern arrangements between plans and their service providers, with a focus on fee transparency.

Along with that initiative, the DOL has proposed changes to Form 5500 which would require plan administrators to disclose indirect fees, including revenue sharing payments, on the plan's annual report. A recent GAO Report severely criticized industry practices and 401(k) fee disclosures.

Form 5500 Schedule C disclosure rules effective this year include listing contract service providers such as brokers, and those providing custodial, consulting, investment or money management, record keeping, trustee, appraisal or investment evaluation services.

This will enable plan sponsors to receive sufficient information about the total fees paid to service providers and revenue sharing arrangements.

Revenue sharing and bundled fees have long been touted as the elegant solution to 401(k) plans as a means to reduce administrative burdens and maximize services from providers.

Unfortunately, these same bundled services are under attack for not having provided adequate disclosure and not having reduced fees as assets have grown, generating excessive expenses for plan participants. Bundled service providers have typically used soft dollar and revenue sharing arrangements to keep all expenses within the plan and be netted against participant accounts.

## Plan Fiduciary Action Plan

These lawsuits are an important reminder of the importance of well-documented fiduciary processes. Fiduciaries must stay informed of all fees and expenses related to the plan, establish and maintain prudent processes to monitor services, expenses and make full disclosure to plan participants.

Plan fiduciaries should act immediately to reduce their potential liability risk by implementing the following due diligence procedures:

### *Retain a disinterested, third party to conduct a fee assessment*

Review embedded and revenue sharing arrangements in the current plan. Review, document, and renegotiate fee arrangements and investment alternatives annually.

### *Implement and document a quarterly investment review*

Review the plan fund performance net of fees, create a watch list and action list, benchmark costs, peer comparison and market index performance.

### *Provide full disclosure to plan participants*

Document the fees and expenses associated with the plan and benchmark those fees against industry standards. Document the review and negotiation of all plan service arrangements, including investment, recordkeeping, trustee, and administrative services.

A clear record shows that the fiduciaries investigated the total plan fees and considered the competitiveness of fees for the plan services received. The record should also reflect that the fees are monitored on an ongoing basis via periodic market checks.

### *Check for undisclosed fees*

Trustees can further reduce their potential fiduciary liability by relying on the advice of an investment consultant to act as intermediary with funds and by structuring the plan to allow participant-directed investments in compliance with DOL regulations.

### *Recapture excessive revenue-sharing fees*

Identify direct and indirect fees among service providers and return them to the plan and its participants. Participant returns can improve and a fiduciary can demonstrate its proactive due diligence process.


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